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Case No. 80-200

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

CHASE MORSEY, JR.,
Petitioner,

vs.

ELMER G. GREEN and FIRST NATIONAL BANK
IN PALM BEACH,
Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit**

BRIEF FOR RESPONDENT FIRST NATIONAL BANK IN PALM BEACH, IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I

DID THE DISTRICT COURT ABUSE ITS DISCRETION IN DETERMINING WHETHER OR NOT IT HAD SUBJECT MATTER JURISDICTION OVER FEDERAL SECURITY LAWS CLAIMS, AND THAT THERE WERE NO MATERIAL FACTS FOR THE JURY?

II

SHOULD THIS COURT ISSUE A WRIT OF CERTIORARI TO REVIEW A QUESTION NOT PRESERVED OR PASSED UPON BELOW?

III

WHETHER PETITIONER'S PURCHASE OF AN INTEREST IN REAL ESTATE, AND ITS EXISTING MINOR COMMERCIAL OPERATIONS, WITH THE EXPRESS EXPECTATION OF A FAST RESALE FOR A SUBSTANTIAL PROFIT BASED UPON THE VALUE OF THE PROPERTY, WHERE THE PETITIONER HAD THE RIGHT OF PRO RATA CONTROL OVER THE COMMERCIAL OPERATIONS AND THE SALE OF THE LAND, CONSTITUTED THE ACQUISITION OR SALE OF A SECURITY UNDER FEDERAL LAW?

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BRIEF FOR RESPONDENT FIRST NATIONAL BANK IN PALM BEACH, IN OPPOSITION

STATEMENT OF THE CASE

Course of Proceedings Below

Petitioner, Chase Morsey, Jr., ("Morsey") brought an action in the United States District Court for the Southern District of Florida against Elmer G. Green ("Green"), and the First National Bank in Palm Beach ("Bank"), alleging violations of the Securities Acts of 1933 and 1934 (15 U.S.C. §77A, *et seq.*, and 15 U.S.C. §78A, *et seq.*), The Investment Advisors Act of 1940 (15 U.S.C. §806, *et seq.*), and state law diversity actions (28 U.S.C. §1332) for securities violations, fraud and breach of fiduciary duty. (R. 1-16, 112-126).[1] Morsey then filed his

1/ References are to the record (R.) as paginated in the Court of Appeals. Exhibits were not indexed in the appellate record. Transcripts of hearings were separately bound and paginated, e.g., (EVH) = Evidentiary hearing on jurisdiction; (R. Vol. pp.) = Trial on the Merits. (PA) = Appendix to Petition for Writ of Certiorari; (RA) = Appendix to this Brief in opposition.

Second Amended Complaint (PA 1-25) adding other defendants, who were later dismissed upon settlement. (R. 844-845).

Green and the Bank moved to dismiss for lack of subject matter jurisdiction. The District Court originally dismissed the action without an evidentiary hearing, (PA 26), and Morsey moved for a rehearing (R. 418-419). The District Court granted rehearing, and scheduled an evidentiary hearing on the issue of subject matter jurisdiction. (PA 27). *Morsey presented no objection to this procedure in the District Court.* The hearing was postponed on several occasions (R. 532, 619, 626). At the hearing, Morsey produced evidence (documents and his own testimony) in an attempt to establish the District Court's subject matter jurisdiction of the federal securities transactions alleged. (EVH 1-77). Following the evidentiary hearing, the District Court dismissed all counts relating to securities violations, and entered an order with written findings of fact and conclusions of law. (R. 689-693; PA 28-32).[2] The District Court denied Morsey's motion (R. 694-695) to certify the case for an immediate appeal under 28 U.S.C. §1292(b). (RA 1).

Thereafter, the case went to trial upon Morsey's Third Amended Complaint, absent the security counts. The jury returned a Special Verdict (RA 3-6) in the form of written findings upon each issue of fact in favor of Green and the Bank, and judgment for defendants was entered. (R. 1453).

At the close of Morsey's case at trial, the District Court reaffirmed, from the bench, its earlier dismissal of the securities claims. (R. Vol. 10, pp. 654-655; RA 2). In part, the Court stated:

> . . . in light of all the relevant evidence gathered in this cause and now further confirmed at this trial, I hereby reaffirm my decision to dismiss all claims under the Federal and Florida securities laws. (RA 2).

2/ While the Order refers to the hearing as pursuant to Fed.R.Civ.P. 42(b), it is obvious that the hearing was held pursuant to Fed.R.Civ.P. 12(d).

On appeal to the United States Court of Appeals for the Fifth Circuit, Morsey did not challenge the procedure utilized by the District Court to determine its jurisdiction over the federal security claims. Morsey's Brief and Reply Brief only sought to retry the District Court's factual determination in this regard, and presented other issues involving discovery and evidence at the trial, not here relevant.[3] *Morsey did not contend that the trial court's procedure denied him a jury trial on any issue so triable.* (RA7).

The Circuit Court affirmed the judgment, without a written opinion, under Fifth Circuit Local Rule 21.[4] (PA 33).

On Petition for Rehearing, Morsey asserted, for the first time, that the District Court's determination that it did not have subject matter jurisdiction over the federal security claims deprived him of a jury trial "on the merits." The Fifth Circuit denied the Petition for Rehearing without opinion. (PA 34).

Statement of the Facts

As in the Fifth Circuit, Morsey complains of the District Court's fact findings but does not refer to the facts developed by the evidence. (EVH). Morsey likewise avoids the evidence at

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3/ The issues as presented to the Circuit Court by Morsey's Brief and Reply Brief, are appended hereto. (RA 7). Dismissal of state law security claims was not appealed.

4/ When the Court determines that any one or more of the following circumstances exists and is dispositive of a matter submitted to the Court for decision: (1) that a judgment of the District Court is based on findings of fact which are not clearly erroneous, (2) that the evidence in support of a jury verdict is not insufficient, or (3) that the order of an administrative agency is supported by substantial evidence on the record as a whole; and the Court also determines that no error of law appears and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

In such case, the Court may in its discretion enter either of the following orders: 'AFFIRMED. See Local Rule 21,' or 'ENFORCED. See Local Rule 21.'

See *N.L.R.B. V. Amalgamated Clothing Workers of America*, 5th Cir. 1970, 430 F.2d 966.

trial,[5] upon which the court *reaffirmed* its earlier interlocutory ruling. (RA 2).

Having met earlier (R. Vol. 8, pp. 95, 194; EVH 5), Green telephoned Morsey in New York City and offered him the opportunity to purchase an interest in 1600 acres of land near Orlando, Florida, known as the Magnolia Ranch. (EVH 5-6, PX 1; R. Vol. 8, p. 96; PA 28). Green sent Morsey a handwritten letter, (RA 8) outlining the purchase, including a planned resale of the property within a year at an appreciated value. ("EX B," to Second Amended Complaint; PA 29; EVH 8-9, PX 2; R. Vol. 8, pp. 102-103). The property had existing income producing assets that could possibly be used to partially offset mortgage payment obligations and other expenses which might be incurred by the purchasers of the property. (EVH 7, 10, 12, 36, PX 1; R. Vol. 8, pp. 98, 122, 209-210; PA 29; RA 8). These were an existing cattle lease, citrus groves, and a hunting lease. (EVH PX 2, R. Vol. 8, p. 210).

In response to the letter, Morsey sent Green a check for $250,000.00 as his 20% share of the downpayment to purchase the property. (EVH 6-7, 43). The other five purchasers, including Green (10% interest), supplied their proportionate amounts necessary for the down payment. (PX 32).

The purchase was accomplished from the owners (Terry Cattle Company) through The Heminway Corporation, (EVH 46-47, 61-62, DX 1-6; R. Vol. 8, p. 211; R. Vol. 9, p. 268). Title was taken in the name of Heminway to protect the identity of various participants, and to limit personal liability in the purchase. (R. Vol. 8, p. 196; R. Vol. 9, p. 268). Heminway and Terry entered into a Management Services Contract (for successive 6 month periods, cancellable on 60 days notice) which provided that the existing ranch operations would continue,

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5/ At trial, Morsey's evidence (Morsey's testimony and documents) concerning the representations which led him to make the purchase was presented first, as a foundation for another witness (R. Vol. 8, pp. 90-92, 93-145). This evidence was presented separately from the alleged fraud and breaches of fiduciary duty.

and Heminway would pay the expenses of its operations. (DX 4; R. Vol. 9, pp. 384-385, 438).

After the purchase, title to the property was transferred to the Bank; the Management Services Contract and the various mortgage obligations were assigned to the Bank. (EVH DX 9, 32; R. Vol. 9, p. 383). Concurrently, a Trust Agreement (RA 9-16) was executed between the purchasers and the Bank as Trustee (EVH 46-47, DX 2; DX 3). This was the first time the Bank knew Morsey or the Magnolia Ranch even existed. (R. Vol. 8, p. 143-144; R. Vol. 9, p. 349, 352, 376-377, 387, 389-390).

The Trust Agreement set forth the basis of the initial transaction, the obligations of the parties, and the percentage interest of each participant. (DX 3; EVH DX 2). The Trust Agreement did not impose or require any discretionary managerial duties by the Bank as Trustee, with respect to the Magnolia Ranch. The agreement recited, among other things, (DX 3; EVH PX 2; RA 9-16):

—That it was between the participants in the purchase of the real estate, as beneficiaries, and the Bank, as Trustee.

—That the Trustee had taken title "in its name, but for the beneficiaries," to the described real estate.

—The purchase price of the real estate.

—That the Trustee's predecessor in title, Heminway, had paid the purchase price.

—The portion of the purchase price represented by the mortgages.

—That percentage of cash paid at closing by each participant.

—That the "ownership of [the real estate] by said Beneficiaries is in the proportions [sic] to the amount of money paid by them." [Gordon, 40%; Morsey, 20%; Heftler, 10%; Wilmot, 10%; Rubloff, 10%; Green, 10%].

—That the Beneficiaries agreed title was to be taken by the Trustee "for the purpose of making the sale of said property easier and with less expense of recording."

—That "title to said property is to be held by the Trustee for the purposes of facilitating the handling of income, if any, and the expenses of said property by placing control of same in its hands."

—The Agreement and Trust "may be terminated at any time by the unanimous request of the Beneficiaries. . . ."

—That this was a "joint venture of the parties, with each party being liable for his portion of any liability incurred or tax incurred."

The Trust Agreement also provided (RA 11):

> That in transacting any business relative to the property, especially in selling the same and in determining the terms under which the sale of said property will be made, the Trustee shall be governed and controlled by a majority consent of the Beneficiaries in accordance with their percentage of ownership, and all parties hereto shall be bound and controlled by such decision.

* * *

Thus, Morsey had the right of substantial pro rata control over the operation of the businesses, and any decisions on sale. (PA 29). Throughout, Morsey took the position that the Trust Agreement and the Heminway purchase documents were not relevant to the security issue. (EVH 60-64).

In operation, the Bank notified the individual beneficiaries

of their payment obligations, according to their percentage interest, and upon receipt of such funds, made payments upon the mortgages. (R. Vol. 10, pp. 540-541). In addition, the Bank, from time to time, received requests for payment of other expenses which would be collected and paid in the same manner. Each year, the Trustee provided beneficiaries with a statement of account reflecting all transactions affecting the Trust. (DX 5; R. Vol. 9, pp. 440-441).

Both at the evidentiary hearing, and later at the trial, Morsey testified that the reason he participated in the purchase of the property was the profit he expected upon its sale. (EVH 28, 45; R. Vol. 9, p. 456). E.g.,:

> Q Why did you make the investment?
>
> A I made the investment because we were going to buy the property at a sacrifice of $750.00 and sell it within 6 months to a year for $1150.00. And my share of that profit would have been a million three hundred thousand dollars. (R. Vol. 9, p. 456).

The total purchase price of the property was approximately $12,000.00 or $750.00 per acre, encumbered by various mortgages and the purchase was made with only a 10% cash down payment. (RA 8). The letter which Morsey relied upon (RA 8) stated that there was $170,000.00 of existing income from existing hunting and cattle leases and groves. The first mortgage was payable at a rate of $75,000.00 per quarter or $300,000.00 a year (of which Morsey's 20% share would be $60,000.00). (RA 9). There existed a second mortgage of $6,850,000.00 with interest only payable until the end of the third year at 7%. Morsey's 20% share of the interest would have been $95,900.00 per year. Green's letter stated: "My plan is to sell in less than one year's time for about 1150 per acre." (RA 8).

In 1974-1975, the real estate market in the State of Florida suffered a severe recession. (R. Vol. 10, p. 673). As a result of

this, and the structure of the mortgage payments, once interest *and* principal payments became due, the beneficiaries began to default. (R. Vol. 10, p. 741). After default, Morsey filed his suit.

In May of 1976 the Bank resigned as Trustee and issued a trustee's deed conveying the property to the participants as tenants in common, according to the interest of each, pursuant to the terms recited in the Trust Agreement. (R. Vol. 9, pp. 528-529). At trial Morsey testified that he exercised his power of control by negotiating an agreement with the former owners, his co-beneficiaries/tenants, and a third party for a contract of sale of the property. (R. Vol. 9, p. 472).

SUMMARY OF ARGUMENT

I

The District Court has discretion to take evidence at a preliminary hearing in order to resolve questions of fact with regard to its subject matter jurisdiction. Even where a jury trial is demanded, subject matter jurisdiction is ultimately a question for the court. Here, the District Court on two occasions did nothing more than determine that subject matter jurisdiction did not present a jury issue.

II

Morsey did not object to the District Court's procedure, nor did he contend in the Circuit Court that he had been improperly denied a jury trial. Morsey attempted to raise this issue only on Petition for Rehearing in the Circuit Court.

The United States Courts of Appeals are not to be utilized as mere way stops on the road to the Supreme Court. Neither should this Court exist as a superior trial and appellate court for resolution of issues waived in lower courts by failure to properly and timely assert them.

III

On the "economic realities," the District Court determined, on two occasions, that Morsey did not purchase a security, and was affirmed without opinion. This Court should not be used as another court of appeal on factual disputes. Morsey purchased an interest in land, admitting that he expected his "profit" to come from its resale at an appreciated value. There was no plan by the purchasers to develop the property.

As a beneficiary/co-tenant under the Trust, Morsey had pro rata control over the sale of the property and its commercial activities, and exercised this power. Nevertheless, the commercial activities were too insubstantial to bring the transaction within the Securities Acts.

ARGUMENT

I

MORSEY WAS NOT IMPROPERLY DENIED A JURY TRIAL. THE DISTRICT COURT CORRECTLY EXERCISED ITS DISCRETION IN FINDING THAT NO ISSUE EXISTED FOR THE JURY.

There was no improper "preemption" of a proper "jury" issue by the trial court's pretrial decision and determination of its jurisdiction over federal securities claims. A district court may consider evidence at a preliminary hearing and resolve questions of fact with regard to its jurisdiction, including federal questions.[6] Although the District Court, in its discretion, may submit fact questions to the jury, the issue of its jurisdiction is ultimately for the court's determination, even where evidence may be disputed.[7] Where the court exercises the dis-

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6/ E.g., *Gibbs v. Buck*, 307 U.S. 66 (1939); *State of Alabama ex rel Baxley v. Woody*, 473 F.2d 10, 12 (5th Cir. 1973); *Rosemound Sand & Gravel Co. v. Lambert Sand & Gravel Co.*, 469 F.2d 416 (5th Cir. 1972); 5 Wright & Miller, Federal Practice and Procedure, §1373, at pp. 714-715 (1969); 4 Moore, Federal Practice, §26.56 [6], at p. 26-190 (1977).

7/ E.g., *Gough v. Rossmoor Corporation*, 487 F.2d 373 (9th Cir. 1973).

cretion to determine its jurisdiction prior to trial on the merits, the plaintiff, as here, is required to establish the court's jurisdiction, and he must establish the jurisdictional facts by preponderance of the evidence just as he would have to at trial.[8]

Morsey made no objection to this procedure in the District Court, nor did he raise the issue in the Circuit Court until his Petition for Rehearing, *after* that court had determined, under its Local Rule 21,[9] that there was no error in law or fact which warranted a written opinion. The Circuit Court rightly denied his petition.

None of the numerous cases cited by Morsey in his Petition pass upon or concern his belated claim of right to a jury trial to determine the court's jurisdiction. Certainly, the criminal cases[10] cited by Morsey as an "inference" of this "right" are not dispositive of the District Court's duty and right to determine its jurisdiction in a civil case, or whether there was an abuse of discretion here.

Morsey's selective quotation of language out of this Court's opinion in *SEC V. Joiner Leasing Corp.*, 320 U.S. 344 (1943), lends no support to his argument that he was denied a jury trial. *Joiner* involved the application of facts, after trial, to the Act's definition of a security. The question of a right to a jury trial was not raised. It is interesting that this Court, in *Joiner*, held that the totality of the circumstances must be considered. Here, the trial court did that on two occasions, first at the evidentiary pretrial hearing, and *reaffirmed* that decision (RA 2) on the facts presented at the subsequent jury trial.[11] Morsey simply failed in his proof.

8/ *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936); *Data Disk, Inc. v. Systems Technology Associates, Inc.*, 557 F.2d 1280, 1285, n. 2 (9th Cir. 1977).

9/ Note 4, *supra*, p. 3.

10/ *Roe v. United States*, 287 F.2d 435 (5th Cir. 1961); *Tarvestad v. United States*, 418 F.2d 1043 (8th Cir. 1969), *cert. den.* 397 U.S. 935 (1970).

11/ A court may reconsider its interlocutory ruling at any time. E.g., *Kenemer v. Arkansas Fuel Oil Co.*, 151 F.2d 567, 568 (5th Cir. 1945).

Morsey's argument that the trial court could deny him a jury trial only under standards applicable to summary judgments or directed verdicts fails to understand that the District Court, in effect, did so out of an abundance of caution. (RA 2). Clearly, had the issue been "tried" with a view to submitting it to the jury, the District Court would have been compelled to direct a verdict. As evidenced by the decision in *Great Western Bank & Trust v. Kotz*, 532 F.2d 1252 (9th Cir. 1976), to argue about whether the District Court's action is to be viewed as a summary judgment or a directed verdict is to argue form only. In *Kotz* the District Court considered matters extraneous to the pleadings on motion to dismiss, and the Circuit Court chose to treat the matter as a summary judgment proceeding. As noted in *Kotz*, 532 F.2d at 1255, while in *some* circumstances it may be *appropriate* to submit the matter to the jury, the question is nonetheless whether a material jury question really exists,[12] and this is ultimately a question of law. In inferentially arguing that the facts did not meet the test for a summary judgment or directed verdict, Morsey's Petition has simply chosen not to refer, *in any manner*, to the facts developed at the evidentiary hearing and reasserted at trial. (*Supra*, p. 4, n. 5).

II

MORSEY DID NOT OBJECT TO THE DISTRICT COURT'S DETERMINATION OF ITS OWN JURISDICTION, AND DID NOT PROPERLY OR TIMELY RAISE ANY SUCH ISSUE IN THE CIRCUIT COURT. THIS COURT SHOULD NOT ENTERTAIN ISSUES WHICH HAVE NOT BEEN PROPERLY RAISED BELOW.

12/ However, it is clear to us that in appropriate circumstances a properly instructed jury can determine whether as a matter of fact a disputed instrument is or is not a 'security.' *SEC v. Joiner Leasing Corp.*, 320 U.S. 344, 351, 355, 64 S.Ct. 120, 123, 125, 88 L.Ed. 88, 93, 95 (1943); *Tarvestad v. United States*, 418 F.2d 1043, 1048 (8th Cir. 1969).

The District Court essentially determined, after viewing all of the other relevant facts, that no jury question was presented with respect to the nature of the Artko note. It is this determination which we review. [532 F.2d at 1255].

While Morsey presents no basis whatsoever for the exercise of this Court's discretionary review, this Court has often stated that it will not review legal issues which were not properly presented in the lower courts, or which were not even raised, including claims of a denial of a "constitutional right."[13]

Here, not only did Morsey not object to the procedure in the District Court, he failed to raise the issue on direct appeal to the Circuit Court, in favor of a belated after-the-fact attempt upon rehearing. Thus, even if the procedure was erroneous, which it was not, Morsey waived his right to claim error.[14] To hold otherwise would simply allow litigants to ignore their duties to the lower courts, and to treat them as way stops to the Supreme Court, thus using this Court as a "superior" *trial* and *appellate* Court.

III

THE MAGNOLIA RANCH WAS NOT A SECURITY

In determining whether a particular transaction is, or is not a "security," substance is exalted over form, and emphasis is placed on the "economic realty" of the total situation.[15]

13/ *Husty v. United States*, 282 U.S. 694, 701-702 (1930); *United States v. Ortiz*, 422 U.S. 891, 898 (1975); *Lawn v. United States*, 355 U.S. 339, 362, n. 16 (1958); *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 163, 164 (1975); *Duignan v. United States*, 274 U.S. 195, 200 (1926) (constitutional issue not asserted below):

> This Court sits as a court of review. It is only in exceptional cases coming here from the Federal Courts that questions not pressed or passed upon below are reviewed.

14/ *Jamestown Farmers Elevator, Inc. v. General Mills*, 552 F.2d 1285 (8th Cir. 1977); *Stephens v. Arrow Lumber Co.*, 354 F.2d 732 (9th Cir. 1966); *Bullock v. Mumford*, 509 F.2d 384 (D.C. Cir. 1974); especially, *National Family Ins. Co. v. Exchange National Bank of Chicago*, 474 F.2d 237, 241 (7th Cir. 1973), *cert. den.* 414 U.S. 825 (1973); *Southland Reship, Inc. v. Flegel*, 534 F.2d 639 (5th Cir. 1976).

15/ *Tcherepnin v. Knight*, 389 U.S. 332 (1967); *SEC v. Joiner, supra, McGovern Plaza Joint Venture v. First of Denver*, 562 F.2d 645 (10th Cir. 1977); See, *Continental Marketing Corp. v. SEC*, 387 F.2d 466 (10th Cir. 1967), *cert. den.* 391 U.S. 905 (1967).

In *SEC v. W. J. Howey Co.*, 328 U.S. 293 (1946), this Court defined an investment contract, in general terms, as a transaction or scheme whereby (1) a person invests his money (2) in a common enterprise and (3) is led to expect profits (4) solely from the efforts of the promoter or a third party. *Howey*, 328 U.S. at 298-299. The citrus grove "units" and "management contracts" in *Howey* bear no relationship to the Magnolia Ranch purchase. However, as to the citrus groves in *Howey*, this Court stated:

> Such tracts gain utility as citrus groves only when cultivated and developed as component parts of a larger area. A common enterprise managed by respondents or third parties with adequate personnel and equipment is therefore essential if the investors are to achieve their paramount aim of a return on their investments. The respective shares in this enterprise are evidenced by land sales contracts and warranty deeds which serve as a convenient method of determining the investors' allocable shares of the profits. The resulting transfer of rights in land is purely incidental. Thus, all the elements of a profit seeking venture are present here. The investors provide the capital and share in the earnings and profits; the promoters manage, control and operate the enterprise. [328 U.S. at 300].
>
> * * *
>
> The test is whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others.
>
> [328 U.S. at 301].

In returning to *Howey* and the economic reality test, this Court, in *United Housing Foundation, Inc. v. Forman*, 421 U.S. 837, 852 (1975), stated:

> . . .the basic test for distinguishing the transaction from other commercial dealings is 'whether the scheme involves an investment of money in a common enterprise with profits to come solely from the

> efforts of others.' Howey, 328 U.S. at 301, 90 L.Ed. 1244, 66 S.Ct. 1100, 163 ALR 1043. This test, in shorthand form, embodies the essential attributes that run through all of the Court's decisions defining a security. The touchstone is the presence of an investment in a common venture premised on a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others. By profits, the Court has meant capital appreciation resulting from the development of the initial investment, as in Joiner, supra (sale of oil leases conditioned on promoters agreement to drill exploratory well), or a participation in earnings resulting from the use of investors' funds, as in Tcherepnin v. Knight, supra, (dividends on the investment based on savings and loan association's profits).

Whether or not the word *solely* is to be given a broad or narrow definition,[16] Morsey's purchase of an undivided 20% interest, with pro rata right of control, (RA 11) in the hope of a quick resale at a substantial profit, and with the possibility that income presently existing from groves and leasing pasture to cattle owners and hunting rights would partially offset his payments for the land, did not constitute a security.[17]

None of the cases cited by Morsey in reliance upon his assertions are factually or legally applicable to the Magnolia Ranch situation, especially when viewed from the standpoint of "economic realities." There is simply no factual basis to support the argumentative contention that Morsey invested in the "managerial efforts of Green," without regard to the inherent value of the property. Both the documentary evidence and Morsey's own testimony (*supra*, p. 7) are to the contrary. The letter upon which Morsey relied (RA 8) specifically stated: "My plan is to sell in less than one year's time for about 1150 per acre." Under the trust agreement (DX 3; EVH PX 2, *supra*, p. 6)

16/ See *Forman*, 328 U.S. at 852, n. 16.

17/ *Howey, supra; Forman, supra; Joiner, supra; Commanders Palace Park v. Girard and Pastel Corp.*, 572 F.2d 1084 (5th Cir. 1978); *Continental Marketing Corp. v. SEC*, 387 F.2d 466 (10th Cir. 1967), *cert. den.*, 391 U.S. 905 (1967); *Oxford Finance Companies, Inc. v. Harvey*, 385 F.Supp. 431 (E.D. Pa. 1974); *Van Arsdale v. Claxton*, 391 F.Supp. 538 (S.D. Cal. 1975).

Morsey had pro rata control both as to the "businesses" and the sale of the property, a right he exercised. The property was physically operated on behalf of the beneficiaries, by the Terry Cattle Company, under its Management Services Contract, previously assigned to the Bank, as Trustee for the beneficiaries under their sole right of control[18] under the Trust. (RA 11).

The existence of the income represented only the possibility of a small offset on the mortgage payment obligations and other expenses incurred by the purchasers of the property. (PA 29; RA 8). As Morsey himself testified, he purchased the property in hope of a *profit* from its *resale* and he was looking to the so-called "income streams" only as ". . . some kind of protection on the down side," and because of the inherent value ". . . I felt that our profit was in hand." (EVH 28).

Morsey's 20% share of the $170,000.00 income which was anticipated at the time he purchased his interest would amount to $34,000.00 per year. Not counting his share of the taxes, or other expenses of the property, Green's letter (RA 8) would have informed even a neophite[19] investor that his share of the interest payments *alone* would be $95,900.00 a year on the second mortgage, and he would be obligated to pay $60,000.00 per year on the first mortgage, for a total yearly payment in excess of $150,000.00. After principal payments on the $6,850,-000.00 became due (eight equal annual payments) his obligations would significantly increase. Even without his testimony that he looked to the *sale* of the land for his profit, it is ludicrous to assert that this income represented a *reasonable expectation* of "profit," relied upon by Morsey, regardless of his right of control. This is especially true where all concerned looked for a

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18/ See e.g., *Commanders Palace Park v. Girard and Pastel Corp.*, 572 F.2d 1084 (5th Cir. 1978); *Hirsh v. du Pont*, 396 F.Supp. 1214 (S.D. N.Y. 1975), *affirmed*, 533 F.2d 750 (2nd Cir. 1977).

19/ Morsey was at the time Executive Vice President of Finance and Planning for the R.C.A. Corporation of New York City, and a sophisticated investor, (EVH 33) with a net worth of $2,900,000.00 (R. Vol. 8, p. 133; R. Vol. 9, pp. 302-303, 306-307; 526-528).

quick sale within a year. No representations that the property could or would be *held* for any *income* potential were made to Morsey by Green. (RA 8). This income is no different in character, under the economic reality test, than the income derived from the leasing, by Co-Op City, of commercial facilities in *Forman*, 421 U.S. at 855:

> The income, if any, from these conveniences all located within common areas of the housing project, is to be used to reduce tenant rental costs. Conceptionally, one might readily agree that net income from the leasing of commercial and professional facilities is the kind of profit traditionally associated with a security investment. See Tcherepnin v. Knight, supra. But in the present case this income - if indeed there is any - is far too speculative and insubstantial to bring the transaction within the Securities Acts.

Morsey's Petition admits that he did not purchase the property upon any representations by Green that it would be developed. As stated by this Court in *Forman*, 421 U.S. at 852:

> By profits the Court has meant either capital appreciation resulting from the development of the initial investment, as in Joiner, . . . or a participation in earnings resulting from the use of investors funds, as in Tcherepnin v. Knight . . .

Morsey's investment in Magnolia Ranch meets neither criteria, regardless of his right of pro rata control.

Here, the "economic reality" of this transaction was that Morsey purchased property with the expectation that he would "profit" when the land was sold at what was hoped to be a substantially higher price. The power to control the property, its insignificant income producing activities, and most important, its ultimate resale to realize the *"profit" he expected*, was solely in his hands and that of the other beneficiaries.[20]

20/ E.g., *Schultz v. Dain*, 568 F.2d 612 (8th Cir. 1978); *Fargo Partners v. Dain Corp.*, 540 F.2d 912 (8th Cir. 1976); *Mr. Steak, Inc. v. River City Steak, Inc.*, 460 F.2d 666, 670 (10th Cir. 1972); *Van Arsdale v. Claxton*, 391 F.Supp. 538 (S.D. Cal. 1975); *Hirsh v. du Pont*, 396 F.Supp. 1214 (S.D. N.Y. 1975), affirmed, 533 F.2d 750 (2nd Cir. 1977).

This is not a *Howey* situation where the only way the investors could hope for any return on their investment was upon their absolute reliance of the ability of the promoter/seller, over whom they had no control. This is not a *Joiner* situation where "the economic realities" were based upon "...the proposed and promised exploration well..." by the sellers, (*Joiner*, 320 U.S. 344, 348), which provided the investment with "...most of their value and all of their lure." Id., at 349. *See also, Forman*, 421 U.S. 837, 853, n. 18.

As found by the District Court, (EVH) and as reaffirmed by the District Court following presentation of the same and more evidence at trial, (RA 2), which was affirmed by the Fifth Circuit:

> Morsey's investment involvement with a joint venture with the expectation he would profit from a rise in the value of the property upon his decision and that of the other beneficiaries to sell or the expectation of profits from ongoing business of which he had substantial control did not constitute the acquisition or sale of a security under Federal law. *VanArsdale v. Claxton*, 391 F.Supp. 538. (S.D. Cal. 1975); *Oxford Financial Corp., Inc. v. Harvey*, 385 F.Supp. 431 (E.D. Pa. 1974). (PA 31-32).

Morsey's Petition presents arguments and assertions in a factual vacuum, obviously in hope that this Court will retry facts on an issue twice determined in the District Court, appealed to the Circuit Court, and affirmed under circumstances where that Court felt that an opinion would have no precedential value. This Court should, as it has done in the past, continue to refuse to become a Court of select errors to be utilized by litigants for correction of asserted fact finding errors.[21]

21/ *Graver Mfg. Co. v. Lindi Air Products Co.*, 336 U.S. 271, 275 (1948); *Southern Power Company v. North Carolina Public Service Company*, 263 U.S. 508 (1923).

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

TED R. MANRY, III, of
MACFARLANE, FERGUSON,
ALLISON & KELLY
Post Office Box 1531
Tampa, Florida 33601
(813) 223-2411
ATTORNEYS FOR RESPONDENT
FIRST NATIONAL BANK
IN PALM BEACH

of Counsel, JOHN F. RUDY, II

CASE NO. 80-200

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

CHASE MORSEY, JR.,

Petitioner,

vs.

ELMER G. GREEN and FIRST NATIONAL BANK IN PALM BEACH,

Respondents.

APPENDIX TO BRIEF FOR RESPONDENT, FIRST NATIONAL BANK IN PALM BEACH, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. WPB 76-8044-Civ-CA

ORDER DENYING MOTION THAT THE COURT AMEND ITS ORDER OF MARCH 23, 1977, TO CERTIFY IT IS APPEALABLE

THIS CAUSE having come before the Court on motion of plaintiff that the Court amend its Order of March 23, 1977, to certify it is appealable, and the Court having considered the record in this cause, and being otherwise duly advised, it is

ORDERED AND ADJUDGED that said motion is DENIED.

DONE AND ORDERED at Miami, Florida, this 7th day of April, 1977.

/s/ C. Clyde Atkins
UNITED STATES DISTRICT JUDGE

DISTRICT COURT'S REAFFIRMATION OF PRIOR DETERMINATION THAT A SECURITY WAS NOT INVOLVED (R. Vol. 10, pp. 654-655)

THE COURT: I think that we have covered all of the exhibits. I think that before the jury comes back I should make one further announcement.

I ruled earlier in this case after an evidentiary hearing that the primary purpose of plaintiff's purchase of an interest in the Magnolia Ranch property was for resale of the land within a year at an increased price and not for development. The income from the grove and the leases were to be used to offset interest payments, thus my finding was that the anticipated increments in the value of the land was the basis for investment and not an expectation of profits from the income-producing operations of the property itself. As such this scheme was not a Section 21 investment contract as defined by the United States and Florida Supreme Court decisions. Hence, the federal securities laws and the Florida Blue Sky laws are inapplicable to the facts in this case. Accordingly, in light of all of the relevant evidence gathered in this cause and now further confirmed at this trial, I hereby reaffirm my decision to dismiss all claims under the Federal and Florida securities laws.

MR. RUDY: Thank you very much, Your Honor.

THE COURT: I do call attention to counsel of the decision of Oil & Gas Income, Inc. vs. Woods Exploration & Producting Co., Inc., 362 F.2d 309 [sic. 365 F.2d 309], a Fifth Circuit decision, making reference to the pertinent portions of 15 U.S. Code Section 77K(3), permitting an award of attorneys fees to a litigant where the suit or defense, as it may be, was without merit.

Bring the jury in.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. WPB 76-8044-Civ-CA

SPECIAL VERDICT FORM
UNDER RULE 49(a), Fed.R.Civ.P.

WE, THE JURY, MAKE THE FOLLOWING FINDINGS OF FACT IN THE FORM OF ANSWERS TO THE QUESTIONS BELOW:

XXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

AS TO DEFENDANT ELMER G. GREEN:

1. (a) Did the defendant Elmer G. Green make a misrepresentation or omission of material fact to the plaintiff Chase Morsey, Jr.?

Yes_____ No X

If your answer to Question No. 1(a) is "No," go on to Question No. "2" and do not answer 1(b), 1(c), and 1(d).

If your answer to Question No. 1(a) is "Yes," then answer 1(b), 1(c), and 1(d).

(b) Was such misrepresentation or omission of material fact made by defendant Elmer G. Green with knowledge that the statement was false, or under circumstances in which defendant Elmer G. Green should have known, if he did not know, of the falsity of it?

Yes_____ No_____

(c) Was such misrepresentation or omission made with the intent to induce the plaintiff Chase Morsey, Jr. to purchase the Magnolia Ranch property?

Yes_____ No_____

(d) What amount of damages, if any, to plaintiff

Chase Morsey, Jr. resulted from such misrepresentation or omission?

$_____

2. (a) Did defendant Elmer G. Green breach a fiduciary duty to plaintiff Chase Morsey?

Yes_____ No X

If your answer to Question No. 2(a) is "No," go on to Question No. "3" and do not answer 2(b).

If your answer to Question No. 2(a) is "Yes," then answer 2(b).

(b) What amount of damages, if any, to the plaintiff Chase Morsey, Jr. resulted from such breach of fiduciary duty?

$_____

XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

AS TO DEFENDANT FIRST NATIONAL BANK OF PALM BEACH:

3. (a) Did defendant First National Bank make a misrepresentation or omission of material fact to the plaintiff?

Yes_____ No X

If your answer to Question No. 3(a) is "No," go on to Question No. 4 and do not answer 3(b), 3(c), and 3(d).

If your answer to Question No. 3(a) is "Yes," then answer 3(b), 3(c), and 3(d).

(b) Was such misrepresentation or omission of material fact made by defendant First National Bank with knowledge that the statement was false, or under circumstances in which defendant First National Bank should have known, if he did not know, of the falsity of it?

Yes_____ No_____

(c) Was such misrepresentation or omission made with the intent to induce the plaintiff Chase Morsey, Jr. to purchase the Magnolia Ranch property?

Yes_____ No_____

(d) What amount of damages, if any, to plaintiff Chase Morsey, Jr. resulted from such misrepresentation or omission?

$_____

4. (a) Did defendant First National Bank breach a fiduciary duty to plaintiff Chase Morsey?

Yes_____ No X

If your answer to Question No. 4(a) is "No," go on to Question No. 5 and do not answer 4(b), 4(c), 4(d), 4(e), and 4(f).

If your answer to Question No. 4(a) is "Yes," then answer 4(b), 4(c), 4(d), 4(e), and 4(f).

(b) What amount of damages, if any, to the plaintiff Chase Morsey, Jr. resulted from such breach of fiduciary duty?

$_____

(c) Do you find as a matter of fact that with respect to the year 1973 of the trust, plaintiff Morsey received an account or other statement fully disclosing matters affecting the trust then within the bank's knowledge?

Yes_____ No_____

(d) If your answer to the above question is "Yes," please answer whether you find as a fact that Morsey failed to assert a claim within six (6) months after receipt of such account or statement.

Yes_____ No_____

(e) Do you find as a matter of fact that with respect

to the year 1974 of the trust, plaintiff Morsey received an account or other statement fully disclosing matters affecting the trust then within the bank's knowledge?

Yes_____ No_____

(f) If your answer to the above question is "Yes," please answer whether you find as a fact that Morsey failed to assert a claim within six (6) months after receipt of such account or statement.

Yes_____ No_____

XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

SO SAY WE ALL.

/s/ Charin
FOREPERSON

DATED THIS 21st DAY OF MARCH, 1978.

ISSUES AND ASSERTIONS OUTLINED IN MORSEY'S BRIEF AND REPLY BRIEF IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

I. THE PARTICIPATION MORSEY PURCHASED FROM GREEN IS A SECURITY.

   A. Morsey Invested in A Common Enterprise with The Expectation of Profit from The Essential Managerial Efforts of Green.

   B. The District Court Erred in Failing to Look beyond The Written Trust Agreement.

   C. The District Court Erred in Holding That The Expectation of Income And The Expectation of Profit from Green's Sale of The Magnolia Ranch Did Not Make The Securities Laws Applicable.

   D. The Howey Test Applies to Real Estate The Same As Any Other Asset.

II. THE DISTRICT COURT ERRED IN FAILING TO INSTRUCT THE JURY ON FLORIDA STATUTES § 475.25.

III. THE DISTRICT COURT DENIED MORSEY A FAIR TRIAL.

GREEN LETTER TO MORSEY EX. B TO COMPLAINT

Sat. Morning

Dear Chase:

Enclosed please find a map of the Orlando area plus some facts concerning the purchase of Magnolia Ranch —

Total acreage 15,876 acres

Price per acre — 755.00

Total price — approx. $12,000,000

1st mtg. — 3,950,000 Federal Land Bank

2nd mtg. — 6,850,000

Cash — 1,200,000

1st mtg. payable $75,000 per quarter

this includes interest, 2nd mtg. interest payable only 7% until the end of the 3rd year. Then 8 equal annual payments.

Property is less than 10 minutes from the Orlando Airport. Less than 20 minutes from Orlando. There are two diamond interchanges located on the property — providing access to the expressway —

There are 700 acres of groves — producing about a $60,000 net profit — a hunting lease at $30,000 per annum & a cattle lease producing about $80,000 per year.

My plan is to sell in less than one year's time for about 1150 per acre.

Please call me on Tuesday if you need further information.

Best regards,
/s/ Ed

TRUST AGREEMENT

THIS AGREEMENT made and entered into as of June 20, 1973, by and between EDWIN F. GORDON, CHASE MORSEY, JR., PIERRE V. HEFTLER, AS TRUSTEE, MOLLIE WILMOT, ARTHUR RUBLOFF and E. G. GREEN, parties of the first part, hereinafter known as "Beneficiaries", and FIRST NATIONAL BANK IN PALM BEACH, 255 South County Road, Palm Beach, Florida, a banking corporation organized and existing under the laws of the United States of America, party of the second part, hereinafter referred to as "Trustee".

WITNESSETH:

WHEREAS, on June 19, 1973, the Trustee did take title in its name, but for the Beneficiaries, to the following described real property lying and being in the County of Orange, State of Florida:

SEE DESCRIPTION ATTACHED

and

WHEREAS, the total purchase price paid for said property by the Trustee's predecessor in title (THE HEMINWAY CORPORATION), was $12,316,780.78, which includes $200,000.00 stock in the Federal Land Bank and purchase of an existing escrow account with said bank. Of said sum, $7,152,549.12 was represented by a purchase money second mortgage and $3,965,547.66 by assumption of an existing mortgage; and

WHEREAS, the amount of cash required to close this transaction, and closing costs, were furnished by the Beneficiaries in the following percentages:

EDWIN F. GORDON	40%
CHASE MORSEY, JR.	20%
PIERRE V. HEFTLER, AS TRUSTEE	10%
MOLLIE WILMOT	10%
ARTHUR RUBLOFF	10%

E. G. GREEN	10%

and,

WHEREAS, the ownership of said property by said Beneficiaries is in the proportions to the amounts of money paid by them and in the percentages recited above; and

WHEREAS, the Beneficiaries have agreed that the title as taken be held by the Trustee for the purpose of making the sale of said property easier and with less expense of recording so that a purchaser of said property would not be required to examine many documents to determine the authority of the record owner to sell said property; and

WHEREAS, the title to said property is to be held by the Trustee for the purpose of facilitating the handling of the income, if any, and the expenses of said property by placing the control of same in its hands; and

WHEREAS, the Trustee has agreed to hold the title to said property in its name, holding it in trust for the Beneficiaries in their above outlined respective percentages and under the terms of this Agreement;

NOW, THEREFORE, in consideration of the premises and the mutual covenants of the parties to this agreement, it is agreed as follows:

1. That the Trustee shall hold said property in trust for the Beneficiaries in the following percentages:

EDWIN F. GORDON	40%
CHASE MORSEY, JR.	20%
PIERRE V. HEFTLER, AS TRUSTEE	10%
MOLLIE WILMOT	10%
ARTHUR RUBLOFF	10%
E. G. GREEN	10%

2. That in transacting any business relative to the property, especially in selling the same and determining the terms under which the sale of said property will be made, the Trustee shall be governed and controlled by a majority consent of the Beneficiaries in accordance with their percentage of ownership, and all parties hereto shall be bound and controlled ' y such decision. When a bona fide offer is received and a majority agree to accept said offer, any or all of the minority shall have the right to retain ownership of the property by purchasing the interest of the majority on the same terms and conditions as the offer.

3. That the Trustee shall, in conveying said property, or otherwise dealing with same in accordance with the directions of the Beneficiaries pursuant to the terms of paragraph 2 hereinabove, convey, lease or let contracts on said property as if it were the individual owner thereof, and under such circumstances the proceeds from same shall be available to the Beneficiaries, subject to the terms and conditions hereinafter set forth; and said Beneficiaries shall have no right to proceed against any third person or persons dealing with the Trustee to recover any losses sustained by reason of the acts of the Trustee so long as said third person or persons shall be a bona fide purchaser, lessee or contractor upon said property.

4. That the Beneficiaries do understand and agree that the property will have certain expenses by reason of principal and interest expenses due on the purchase money mortgage, public liability insurance, and by reason of the taxes that may be assessed against the property by the proper taxing authorities. It is understood and agreed that when the time for the payment of such expenses comes due, the Trustee shall notify the Beneficiaries of their pro rata share of the indebtedness at least thirty (30) days prior to the maturity date. (For the purpose of this agreement, the maturity date of all taxes shall be November 30 of each year). Within twenty (20) days from the receipt of said notice, the Beneficiaries will deliver to the Trustee the amount due. No beneficiary shall have any personal liability hereunder and recourse against a Beneficiary shall be limited to his interest in the property.

If the Trustee shall pay or incur any liability to pay any money on account of this trust or incur any liability to pay any money on account of being made a party to any litigation as a

result of holding title to the trust property or otherwise in connection with this trust, whether because of breach of contract, injury to person or property, fines or penalties under any law or otherwise, the Beneficiaries jointly and severally agree that on demand they will pay to the Trustee with interest at the rate of six per cent per annum, all such payments made or liabilities incurred by the Trustee, together with its expenses including reasonable attorney's fees, and that they will indemnify and hold the Trustee harmless of and from any and all payments made or liabilities incurred by it for any reason whatsoever as a result of this agreement; and all such amounts so paid by the Trustee, as well as its compensation under this agreement, shall constitute a lien on the trust property. The Trustee shall not be required to convey or otherwise deal with the trust property so long as any money is due to the Trustee under this agreement; nor shall the Trustee be required to advance or pay out any money on account of this trust or to prosecute or defend any legal proceeding involving this trust or any property or interest under this agreement unless it shall be furnished with sufficient funds or be indemnified to its satisfaction.

5. For the purpose of this agreement, it is understood that the Trustee will be compensated at the rate of 1/10th of 1% of the original purchase price paid by the Trustee for the property, payable annually, with the first payment being due one (1) year from the date of this agreement.

In the event the property is sold within one year from the date of this agreement, then, and in that event, the Trustee will be entitled to the entire yearly fee; however, in the event the property is sold during any year after the first year, then, and in that event, the Trustee will receive only that portion of the fee for the year that has passed.

6. This agreement and trust may be terminated at any time upon the unanimous request of the Beneficiaries, but in no event shall run for a period of more than twenty-one years from the date hereof.

In the event of such termination, the Trustee will convey the property to whatsoever person or persons the Beneficiaries shall unanimously designate and all rights and liabilities of the Trustee created hereunder will thereafter be null and void.

In the event the said Beneficiaries shall fail to so designate who shall receive title, then the Trustee shall convey by appropriate deed to the Beneficiaries named herein as tenants in common in the percentages stated hereinabove.

The Trustee may resign at any time by sending a notice of its intention to do so by registered mail to each of the Beneficiaries under this agreement at his address last known to the Trustee.

Such resignation shall become effective twenty days after the mailing of such notices.

In the event of such resignation, a successor, or successors may be appointed by a majority of the beneficial interest, and the Trustee shall convey the trust property to such successor or successors in trust.

If no successor in trust is so named within twenty days after the mailing of such notice, then the Trustee may convey the trust property to the Beneficiaries in accordance with their respective interest, or the Trustee, at its option, may file a suit for appropriate relief in any court of competent jurisdiction.

The Trustee notwithstanding such resignation shall have a lien on the trust property for its costs, expenses and attorneys' fees for its reasonable compensation.

7. It is agreed that in the event the Beneficiaries fail to contribute to the Trustee the funds necessary to meet the expenses hereinabove set forth, and the property therefore becomes in default and subject to foreclosure, the Trustee shall have no obligation or responsibility whatsoever to protect the interest of the Beneficiaries beyond the thirty day notice hereinabove mentioned.

In the event of a default on the part of a Beneficiary hereunder in the payment of any money obligations on his part set forth herein the said Beneficiary shall forfeit his entire interest in this trust. This interest would then be distributed among the remaining Beneficiaries in their proportionate amounts.

8. It is not the intention of the parties hereto in making this agreement to limit the liability of the Beneficiaries and to

impose a greater liability upon the Trustee. It is not the purpose of the parties hereto to avoid the payment of income tax. It is not the purpose of the parties hereto to assume the characteristics of a corporation without complying with the corporation laws of the State of Florida, nor is it the purpose of the Beneficiaries to seek the advantages of a corporation without the corresponding tax disadvantages. This is a joint venture of the parties, with each party being liable for his portion of any liability incurred or tax incurred. The purpose of the parties in making this trust agreement is solely for simplicity of holding title and conveying.

9. The Trustee shall not be required in dealing with the trust property or in otherwise acting under this agreement (a) enter into any individual contract or other individual obligation whatsoever nor (b) to make itself individually liable to pay or incur the payment of any damages, attorneys' fees, fines, penalties, forfeitures, costs, charges, or other sums of money whatsoever. The Trustee shall have no individual liability whatsoever arising from its ownership as Trustee of the legal title to the trust property or in respect to any act done or contract entered into or indebtedness incurred by it in dealing with the trust property or in otherwise acting under this agreement, except only so far as the trust property and any trust funds in the actual possession of the trustee shall be applicable to the payment and discharge of such liability or obligation.

10. This agreement shall not be placed on record in the County in which the trust property is situated or elsewhere; but if it is so recorded, such recording shall not be considered as notice of the rights of any person under this agreement derogatory to the title or powers of the Trustee.

11. It is understood and agreed that any conveyance made by the Trustee involving the real property in question shall be by Trustee's deed without warranty of title.

12. It is understood and agreed that this agreement shall be construed pursuant to the laws of the State of Florida.

13. Where approval and/or consent is to be given by the Beneficiaries to the Trustee, the Trustee is authorized to act upon the written or telegraphic communication wherein Beneficiaries give consent to proposed act of the Trustee by confirm-

ing therein to Trustee the major terms of the proposal, and the Trustee shall thereupon be authorized to act thereon; subject, of course, to the majority consent as set forth in paragraph 2.

14. The terms and conditions of this agreement shall inure to the benefit of and be binding upon any successor trustee under it as well as on the executors, administrators, heirs, assigns and all other successors in interest of the Beneficiaries.

IN WITNESS WHEREOF, the parties hereto have caused this instrument to be signed in their names and have hereunto set their hands and seals as of June 20, 1973.

WITNESSES:

_____(SEAL)
EDWIN P. GORDON

_____

_____
As to Edwin P. Gordon

/s/ Chase Morsey, Jr. (SEAL)
CHASE MORSEY, JR.

/s/ Mildred Barr

/s/ Alice R. Tina
As to Chase Morsey, Jr.

_____(SEAL)
PIERRE V. HEFTLER, Trustee

_____

_____
As to Pierre V. Heftler, Trustee

_____(SEAL)
MOLLIE WILMOT

_____

_____
As to Mollie Wilmot

_____(SEAL)
ARTHUR RUBLOFF

_____

_____
As to Arthur Rubloff

_____(SEAL)
E. G. GREEN

_____

_____
As to E. G. Green

BENEFICIARIES

FIRST NATIONAL BANK
IN PALM BEACH

By /s/ Charles A. Penney
Trust Officer
TRUSTEE